



*New Mexico
Coalition for Healthcare Information Leadership Initiatives **

**New Mexico HIPAA Conference, October 22 & 23, 2001
Session Results**

Session Name: Preemption: How is Preemption of HIPAA Privacy Regulations being determined in New Mexico?

Session Number: 151P

TOPIC	DISCUSSION	ACTION
1. Welcome & Introductions	Debra Trout, Moderator for the Preemption Workgroup, welcomed the attendees and introduced the four panel members: Pam Lambert, Senior Attorney, UNM Institute of Public Law; Jerry Dickinson, Deputy General Counsel, NM Department of Health; Barbara Quissell, Associate Counsel, Blue Cross and Blue Shield of New Mexico; and Zeke Sedillo, Information Services, Lovelace Health Systems.	
2. Overview	<p>Debra began the workgroup discussion by advising the enforcement date for preemption is April 14, 2003. Federal law can be preempted by State Privacy laws in certain circumstances. She referred the group to the NM CHILI website where they will find the full text on the Privacy ruling. In addition, she advised Pam Lambert has been helping to provide an analysis of where state privacy laws preempt federal HIPAA requirements. Pam has also been reviewing the preemption analysis from the AHA model.</p> <p>Pam noted preemption is a legal concept whereby federal law can be displaced or negated by state law if the state law is more stringent. She advised state laws that provide greater protection usually preempt federal requirements, however, it is important to decide what law or regulation is relevant in a specific circumstance to determine when preemption is applicable.</p> <p>Uniformity with the way preemption is handled would be a benefit to all and NM CHILI can influence that design through their collaborative efforts. Pam thanked Debra Trout and Julie Fulcher of Presbyterian Healthcare Services for their efforts to keep the Workgroup motivated and on task.</p> <p>She then noted there are about 30 regulations and 7 groups of statutes that are subject to preemptive interpretation and put through the analysis. The regulations specifically relate to protection of health information. Of special concern are the types of information needing the highest protection, such as HIV test results or genetic information covered under the Privacy Act.</p>	

2. Overview Continued	<p>The Workgroup is currently reviewing the following:</p> <ul style="list-style-type: none"> -Uniform Health Information Statutes Act -DOI Managed Care Rule -Substance Abuse -Mental Health 	
3. Gap Analysis	<p>Pam reported the gap analysis started with an evaluation of the Genetic Information Privacy Act for New Mexico. A test was applied to the statute and to the applicable HIPAA provisions. A list of provisions from the state statute was compared to the corresponding Privacy ruling. Also, the AMC checklist was also applied. And, information provided by the AHA was taken into consideration. The AHA provided a flowchart with a model framework that hospitals can use to conduct or evaluate when preemption applies. The flowchart represents the latest approach to the analysis and is a useful tool.</p> <p>She added that analyses have to be done for each specific area and not as a whole. She recommended being in tune with what other people are doing in the State because an exception may have already been requested through another association.</p> <p>She noted there is a catch-all category “with respect to any other matter”, which is pretty broad and hard to access.</p>	
4. Challenges	<p>Zeke provided a view from a Provider and Health Plan perspective, advising you cannot jump into implementing regulations if you are unsure which statute to use.</p> <p>One good starting point would be to look to the authors of the federal regulations. Compliance, risk management and legal are all key to a successful implementation.</p> <p>The advantages to participating on the NM CHILI workgroup include policy building around collaborate efforts. Everyone takes a piece of the puzzle and comes out on the same page; they share the work and share the results. Participation in the workgroup will produce quicker compliance results.</p>	
5. Payor Perspective	<p>Barbara brings a Payor perspective to the table, which is a much simpler view. Providers have multi-layers of how to handle protected health information.</p> <p>There are a few questions still on the table unanswered, such as:</p> <ul style="list-style-type: none"> -how long will the federal government let individual entities or states draw the line? -why should we go through this exercise? -should we protect privacy or make transactions easier? -does one size fit all? <p>She cautioned that the Graham Leech Blyley privacy regulations at the State level are also under consideration for health insurers. The question outstanding is if you are a covered entity complying with HIPAA, will you be a covered entity complying with Graham Leech Blyley?</p>	

	<p>New Mexico did not adopt privacy/confidentiality model acts done so by other States. This becomes an advantage, because New Mexico does not have to compare and analyze this type of language.</p>	
<p>6. DOI Participation</p>	<p>Jerry advised the Department of Insurance will not be the State agency to petition for preemption determinations. NM CHILI should spell out the controlling factors of preemption as a guidance document.</p> <p>For the Privacy ruling, it falls under the Health and Human Services Office of Civil Rights. However, Jerry feels it will be another year before we see a ruling or guidance documents from Ms. McAndrews from Health and Human Services Office of Civil Rights. It is possible that we will see some minimal delegation of enforcement responsibilities at the State level. He clarified the State requires the Plan or Provider to retain consent records for 10 years, while the Federal government stipulates 6 years.</p> <p>If HIPAA requires a disclosure/consent form, then the Provider/Plan should get a mandatory consent signed by the patient and also a special authorization. It may not always be easy, but it is better to do more than less, as long as the services are to the patient's benefit.</p>	
<p>7. Questions & Answers</p>	<p>Q – What would surveyors look for? A – JCAHO accredited (or other accredited organization) standards, as a general rule. They will not do routine checks, but will respond primarily to complaints of violations. The first step would be the State Health and Human Services Division sending out an auditor.</p> <p>Q – Would you address how HIPAA would affect workers compensation and OSHA requirements? A – Workers compensation is not included in HIPAA regulations, nor are workers compensation carriers considered covered entities. Look to in-house legal counsel to help interpret these issues.</p> <p>Jerry added if NM CHILI goes through an analysis and makes a determination that the State law is more stringent, he would advise to abide by State law requirements. This analysis was not done in a vacuum and he would be inclined to use the opinion because of the “reasonableness” attached.</p> <p>Q – What will be done with the results of the analysis from the workgroup? A – Results will be posted to the NM CHILI website. Pam also recommends NM CHILI get a “stamp of approval” from the State on their findings. One approach might be to give the Health Policy Commission the results to pass along to the Attorney General's office as a recommendation.</p>	

	<p>Q – At the Federal level, are authorizations for other 3rd party payors in conflict with HIPAA? A – Jerry responded no.</p> <p>Q – What is the timeline for deliverables from NM CHILI? A – It depends on the availability of the volunteers who comprise NM CHILI to complete their work.</p> <p>Q – What if a patient or responsible party refuses to sign a consent form? A – There are exceptions that cover this issue, including but not limited to refusing treatment.</p>	
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